Supreme Court, U.S.
FILED
OCT 8 - 2008
OFFICE OF THE CLERK

No. 08-324

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN CHISOLM,

Petitioner,

v.

KELLY J. SULLIVAN, BEVERLY SHOUN, Principal COHEN, GARY BOLING, KATHRYN JONES, HEATHER MOODY, TARA GAUNTT, TOM DOHRMANN, JOE REDDEN, LINDSEY TIPPINS, CURT JOHNSTON, BETTY GRAY, and COBB COUNTY SCHOOL DISTRICT (CCSD),

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT TO THE QUESTIONS PRESENTED

1. Whether the Petitioner has timely filed the writ of certiorari with the Supreme Court of the United States.

2. Whether the Petitioner's Writ of Certiorari complied with the Rules of the Supreme Court.

3. Whether the Georgia Court of Appeals committed any error in affirming the dismissal of the Petitioner's lawsuit which was filed in the State Court of Cobb County, Georgia

PARTIES TO THE PROCEEDING

The Petition for a Writ of Certiorari ("Pet.") correctly identifies the parties to the proceeding below however the Petitioner has incorrectly spelled the names of some of the individuals, namely Lindsey Tippins and Curt Johnston.

TABLE OF CONTENTS

COUNTER STATEMENT TO THE QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

I. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW AND JURISDICTION 1

STATUTE AND REGULATION INVOLVED 1

STATEMENT 2
1. State Court Proceedings 2
2. Federal Court Proceedings 2
3. State Court Proceedings 3
4. Court of Appeals Proceedings 4
5. Georgia Supreme Court Proceedings 4

REASONS FOR DENYING THE REVIEW 4
1. Petitioner's Writ is Untimely 4
2. Petitioner Failed to Comply With Supreme Court Rules 5
3. Petitioner's Complaint Failed to State A Claim 6

Official Immunity Bars Petitioner's State Law Tort Claims Against Individual Respondents 9

Petitioner's Claim for Punitive Damages Fails 14

Statute of Limitations Defense for State Law Claims 15

Petitioner's Failure to Properly Serve the Respondents 16

Petitioner Failed to Properly Plead His Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress Claim. 17

Any Claim Premised on O.C.G.A. 20-2-720 Must Be Dismissed 18

Petitioner's Claims in Count II, III, IV, V and VII are Barred for Failure to State a Cognizable Claim 18

Petitioner has Abandoned All of his Claims Against the Respondents. 20

Petitioner's Complaint Must Be Dismissed For Failure to Serve the Complaint on Respondent Jones or Cohen 20

Lack of Personal Jurisdiction Over Respondent Jones or Cohen Because of Lack of Service 23

Res Judicata Applies to All of Petitioner's Federal Law Claims 23

II. CONCLUSION 24

APPENDIX

Order of the Georgia Court of Appeals Denying Motion for Reconsideration dated February 26, 2008.....A-1

Order of the United States District Court For the Northern District of Georgia, Atlanta Division, dated March 19, 2007.....A-3

Order of the Supreme Court of Georgia.....A-13

TABLE OF AUTHORITIES

CASES

Bitterman v. Atkins, 217 Ga. App. 652, 654 (1995).....11
Bowles v. Russell, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)..... 4
Bradley v. Ga. Inst. Of Tech., 228 Ga. App. 216, 491 S.E. 2d 453 (1997). 2, 24
Bynum v. Fulton-DeKalb Hosp. Auth., 267 Ga. App. 899, 600 S.E.2d 623 (2004). 15
Cohen v. Cahill, 281 F.2d 879 (9th Cir. 1960)..... 6
Crisp County Sch. Sys. v. Brown, 226 Ga. App. 800, 487 S.E.2d 512 (1997). 8
Crisp County School District v. Pheil, 231 Ga. App. 139, 498 S.E.2d 134 (1998). 9
Denny v. Croft, 195 Ga. App. 871, 395 S.E. 2d 72 (1990)..... 23
Duffy v. Lyles, 281 Ga. App. 377, 636 S.E. 2d 91 (2006)..... 21, 22
Elwell v. Cutler, 185 Ga. App. 423, 364 S.E. 2d 81 (1987),..... 22
Gamble v. Ware, 253 Ga. App. 819, 561 S.E.2d 837 (2002),..... 13, 14
Georgia Power v. Johnson, 155 Ga. App. 862, 274 S.E.2d 17 (1980)..... 17
Hall v. Carney, 236 Ga. App. 172, 511 S.E.2d 271 (1999)..... 18
Heckler v. Edwards, 465 U.S. 870, 104 S. Ct. 1532 (1984..... 6
Helmuth v. Life Ins. Co. of Ga., 194 Ga. App. 685, 391 S.E. 2d 412 (1990)..... 23
Joyce v. Van Arsdale, 196 Ga. App. 95, (1990);..... 13

Kelly v. Lewis, 221 Ga. App. 506,
471 S.E.2d 583 (1996),..... 13
MARTA v. Boswell, 261 Ga. 427,
405 S.E. 2d 869 (1991)..... 15
MARTA v. Mosley, 280 Ga. App. 486,
634 S.E.2d 466 (2006)..... 17
Maryland v. Baltimore Radio Show, Inc.,
338 U.S. 912, 70 S.Ct. 252 (1950); 4
McManus v. Sauerhoefer, 197 Ga. App. 114,
397 S.E. 2d 715 (1990)..... 22
Merck v. St. Joseph's Hosp. of Atlanta,
251 Ga. App. 631, 555 S.E.2d 11 (2001). 16
Murphy v. Bajjani, 282 Ga. 197,
647 S.E. 2d 54 (2007)..... 13, 14
Nicolson v. Windham, 257 Ga. App. 429,
571 S.E. 2d 466 (2002)..... 19
Parker v. Silviano, 284 Ga. App. 278,
643 S.E. 2d 819 (2007)..... 22
Sawyer v. Sawyer, 253 Ga. App. 619,
560 S.E. 2d 86 (2002)..... 21
Schmidt v. Adams, 211 Ga. App. 156;
438 S.E.2d 659 (1993)..... 10
Scott v. Taylor, 234 Ga. App. 543,
507 S.E. 2d 798 (1998)..... 22, 23
Sharpley v. Davis, 786 F.2d 1109 (11th Cir. 1986).. 24
Shuman v. Dyess, 175 Ga. App. 213,
333 S.E.2d 379 (1985)..... 12
Sisson v. Douglas County School District,
181 Ga. App. 77, 3515 S.E. 2d 272 (1986) 11
Swofford v. Cooper, 184 Ga. App. 50,
360 S.E.2d 624 (1987)..... 11, 12
Wellborn v. Dekalb County Sch. Dist.,
227 Ga. App. 377; 489 S.E.2d 345 (1997). 8
Wilkinson v. Udinsky, 242 Ga. App. 454 (1),
530 S.E.2d 215 (2000)..... 16

Williams v. Bragg, 260 Ga. App. 377,
579 S.E. 2d 800 (2003).....22
Williamson v. Perret's Farms, Inc.,
128 Ga. App. 687, 197 S.E.2d 754 (1973) 8

STATUTES

20 U.S.C. § 1400 1
20 U.S.C. § 6301 1
28 U.S.C. § 2101(c). 5
29 U.S.C. § 794 1
42 U.S.C. § 1983 2
O.C.G.A. § 20-2-720..... 18, 20
O.C.G.A. § 50-21-22(5) 8
O.C.G.A. § 9-11-4(b). 16
O.C.G.A. § 9-11-4..... 16
O.C.G.A. § 9-12-40..... 23
O.C.G.A. § 9-3-33..... 15

RULES

Fed.R.Civ.P. 12(a)(4)(A). 3
Sup. Ct. R. 10.....5
Sup. Ct. R. 10(a).....5
Sup. Ct. R. 10(b).....6
Sup. Ct. R. 13 5
Sup. Ct. R. 13.1.....5
Sup. Ct. R. 14(a) 6
Sup. Ct. R. 6.2 ..... 3, 20

CONSTITUTIONAL PROVISIONS

Art. I, Sec. II, Par. IX (e), Ga. Const. of 1983..... 8

I. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW AND JURISDICTION

The Opinion of the Court of Appeals of Georgia affirming the order from the state court of Cobb County, Georgia granting the Respondent's motion to dismiss the state-law claims of the Respondents, which was published as 289 Ga. App. 757 and is reprinted in the Appendix to the Petition at Appendix 1. A timely motion for reconsideration was denied by that Court on February 26, 2008. (Appendix 1.) Respondents contend that the Petition for Writ of Certiorari was not timely filed.

STATUTE AND REGULATION INVOLVED

This petition apparently involves the decision of the Appeals Court of Georgia to affirm the dismissal of the Petitioner's state law tort claims as follows: mental anguish, neglect, harassment, cruelty, reprisal, discrimination, and defamation. Petitioner also sought $12,000,000 in general and special damages, and $ 2,000,000 in punitive damages. Previously, the U.S. District Court dismissed the Petitioner's federal law claims for discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 violations of the Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.*, and violations of No Child Left Behind, 20 U.S.C. § 6301 *et seq.* The U.S. District Court granted the dismissal of those federal claims on March 19, 2007. (Appendix 2.) Hence, res judicata barred the re-litigation of the federal law claims in

state court. *Bradley v. Ga. Institute of Tech.*, 228 Ga. App. 216, 217, 491 S.E. 2d 453 (1997).

STATEMENT

1. **State Court Proceedings.** The Petitioner filed his complaint on October 9, 2006, in the State Court of Cobb County. All of the Petitioner's summonses were defective. The Respondents removed this case from the State Court of Cobb County to U.S. District Court, Northern District of Georgia, on November 13, 2006, based on the Petitioner's apparent federal law claims. Pre-Answer Motions to Dismiss were filed on behalf of all Respondents except for Respondent Jones and Cohen.[1] The Petitioner's complaint contained, or appeared to contain, alleged violations of federal law, such as: a claim pursuant to 42 U.S.C.§ 1983 claim, a violation of the Individuals with Disabilities Education Act ("IDEA"), and a violation of the Family Educational Rights and Privacy Act ("FERPA").

2. **Federal Court Proceedings.** After the case was removed to federal court in November, 2006, the Petitioner filed a motion for summary judgment in both federal and state court, filed a motion to compel[2], served discovery requests, and

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[1] The Cobb County School District has searched its records and could find no records for any "Principal Cohen." Respondent Jones was never been personally served with this lawsuit. Counsel for the Respondents had no knowledge that Respondent Cohen had ever been personally served with this lawsuit.

[2] Petitioner filed his motion to compel on the same day that he served the discovery requests.

filed a motion to strike. These motions were made despite the fact that the Respondents filed a Pre-Answer Motion to Dismiss in federal court pursuant to Fed.R.Civ.P. 12(a)(4)(A).

On March 19, 2007, the U.S. District Court entered an order dismissing the Petitioner's federal law claims, remanding the state law claims back to the Cobb County State Court. (Appendix 2.)

3. **State Court Proceedings.** Back in state court, the Cobb County School District and the Individual Respondents, except for Kathryn Jones and Principal Cohen, filed their Answers and a Motion to Dismiss on March 23, 2007, arguing that all of Plaintiff's claims against them were subject to immediate dismissal for various reasons. The Respondents filed a Motion to Stay discovery pending the Court's ruling on the Motion to Dismiss. Then Respondents' Jones and Cohen filed their Motions to Dismiss and Answers on April 13, 2007.

Since the remand of the case to state court, the Petitioner filed two motions to strike in federal court and two motions to strike in state court. To the extent that the Petitioner responded to the Respondents' motion to dismiss, he filed a Response Brief on May 1, 2007, which was filed more than thirty-three (33) days after service. Sup. Ct. R. 6.2.

In either state or federal court, the Petitioner never identified any facts in his responsive briefs that even suggested that his claims were timely filed or that he had set forth any viable causes of action. Instead, the Petitioner talked about removing certain school officials from their positions, sought an apology from the School District and accused the Respondents of "being naughty (misbehavior)." He

even made references to "Humpty Dumpty," and a "mad diabolical 'master' plan" of "superior" funding.

On May 21, the State Court of Cobb County dismissed all of the Petitioner's state law claims. The Petitioner filed a Notice of Appeal on May 24, 2007, but failed to set forth the jurisdictional authority of the Georgia Court of Appeals. Notably, the Petitioner never identified what legal error was committed by the State Court in dismissing his complaint.

4. Court of Appeals Proceedings. On February 5, 2008, the Appeals Court of Georgia affirmed the dismissal of Petitioner's complaint by the State Court. The Petitioner filed a motion for reconsideration of the Appeal's Court opinion on February 14, 2008. On February 26, 2008, the Appeals Court denied the motion for reconsideration.

5. Georgia Supreme Court Proceedings. On March 3, 2008, Petitioner filed a notice of intent to file a Petition for Certiorari. On March 14, 2008, Petitioner filed his Petition for Certiorari to the Georgia Supreme Court. On June 2, 2008, the Georgia Supreme Court denied Petitioner's petition. The motion for reconsideration was denied on June 30, 2008. (Appendix 3.)

REASONS FOR DENYING THE REVIEW

1. Petitioner's Writ is Untimely. Among the grounds that the United States Supreme Court can deny a writ of a petition for certiorari is because it is not timely. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S.Ct. 252 (1950); *Bowles v.*

Russell, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007). Petitioner is seeking a review of the Court of Appeals decision, which was issued on February 5, 2008. The denial of the motion for reconsideration was issued on February 26, 2008. Sup. Ct. R. 13 provides that "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Sup. Ct. R. 13.1. Here, the Petitioner had to file his petition for writ of certiorari with the U.S. Supreme Court on or before May 27, 2008. However, he did not file his petition until September 5, 2008. Under federal law, an untimely filed writ of certiorari is a basis to deny the Supreme Court's jurisdiction over the matter. 28 U.S.C. § 2101(c). Hence, Respondent's petition must be denied.

Further, Petitioner is seeking a review of a decision of the Georgia Court of Appeals, which is not the court of last resort in the State of Georgia. Ga. Const. Art. VI, Sec. VI, Para. III, V, VI. Hence, Petitioner's petition should be denied.

2. **Petitioner Failed to Comply with Supreme Court Rules.** The Petitioner has not properly set forth any question for the U.S. Supreme Court to review. Sup. Ct. R. 10. Namely, Petitioner does not seek a review of any decision made by a United States Court of Appeals. In fact, no such court rendered any decision in this case. Sup. Ct. R. 10(a).

Petitioner also does not seek review any decision rendered by the court of last resort in Georgia, which is the Georgia Supreme Court. Sup.

Ct. R. 10(b). The Petitioner merely requests the review of a decision by the Georgia Court of Appeals, which is untimely for the reasons set forth above.

Finally, and in reviewing Petitioner's petition, it is not clear what the legal question is that he is trying to present to the U.S. Supreme Court. For instance, he stated that decision of the Georgia Court of Appeals erred by applying the doctrine of respondeat superior. However, the Georgia Court of Appeals decision never addressed that legal concept in its decision. Further, the Plaintiff asserts that the Georgia Court of Appeals decision conflicted with an opinion from Ninth Circuit Court of Appeals. *Cohen v. Cahill*, 281 F.2d 879 (9th Cir. 1960). However, that opinion was applying the federal rules of civil procedure, which was not an issue addressed by the Georgia Court of Appeals. The remaining cases cited by the Petitioner are inapposite. In sum, Petitioner's questions presented do not comply Sup. Ct. R. 14(a) and his petition should be denied.

3. **Petitioner's Complaint Failed to State a Claim**. The granting of a writ of certiorari is not a matter of right, but one of discretion exercised by the U.S. Supreme Court. *Heckler v. Edwards*, 465 U.S. 870, 885, 104 S. Ct. 1532 (1984). Because Petitioner's complaint lacks any merit, the Supreme Court should deny his petition.

Assuming the facts stated in Petitioner's Complaint are true, Petitioner is the parent of a student (hereinafter referred to as "P.A.C.") who was a student at Norton Park Elementary School and Floyd Middle School in the Cobb County School District. The Petitioner provided no dates of his daughter's attendance at either school. The

Petitioner did not set forth any facts that a tort was committed within the statute of limitations for the claim. Further, the Petitioner has brought the complaint only on his behalf. There are no causes of action being brought on behalf of his daughter.

Generally, the Petitioner claims that he was discriminated against in the following manner: he was harassed and retaliated against in response to his requests to review his child's educational records, he was denied his request to have his child tested for special education services, his request for parent conferences and his request to be involved in the PTSA. Specifically, he claimed that on October 15, 2003, the School District refused his request for an evaluation of P.A.C. Petitioner further claimed that the School District failed to place his daughter in a class that he requested and that he was retaliated against. Finally, he claims that a teacher harassed him on April 30, 2005, when the teacher was with a gentleman around 2 a.m. outside of a Kinko's. According to the complaint, the teacher subsequently defamed the Petitioner. No specific defamatory statement was ever identified or referenced to in his complaint, nor was there any mention about the date of the alleged defamatory statement.

Petitioner has failed to state any claim against the Respondent Cobb County School District. In this case, the doctrine of sovereign immunity operates as a complete bar to Petitioner's claims against the Cobb County School District. Even accepting all of Petitioner's allegations as true, the allegations asserted in their complaint fail to state a claim for relief against the Cobb County School District under clearly established Georgia law. The following claims in Petitioner's complaint are ostensibly based on Georgia law: Count I – mental

anguish (Petitioner's complaint ¶11.); Count II – Neglect (Petitioner's complaint ¶12.); Count IV – Cruelty; and Count VII – Defamation of Character

To explain, the Cobb County School District is a political sub-division of the State of Georgia, and is vested with sovereign immunity unless such immunity is waived in accordance with Art. I, Sec. II, Par. IX (e), Ga. Const. of 1983. *Crisp County Sch. Sys. v. Brown*, 226 Ga. App. 800, 487 S.E.2d 512 (1997). The Georgia Tort Claims Act provides for a limited waiver of the state's sovereign immunity for the torts of its officials and employees, but the Act expressly excludes counties and school districts from the waiver. O.C.G.A. § 50-21-22(5). *Wellborn v. Dekalb County Sch. Dist.*, 227 Ga. App. 377; 489 S.E.2d 345 (1997). Therefore, the Georgia Tort Claims Act does not divest the Respondent School District of sovereign immunity. Sovereign immunity can only be waived by a legislative act that specifically states that sovereign immunity is waived. Consequently, the Cobb County School System is excluded from the provisions of the Georgia Tort Claims Act. Simply put, the Respondent Cobb County School District is not subject to suit absent a waiver of its immunity. There is no such waiver in this case, and as a result, none of the state law claims presented in Petitioner's Complaint entitle him to a recovery against the School District.

A motion to dismiss is aimed at the merits of a claim. *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 687, 197 S.E.2d 754 (1973). Petitioner's claims against the respondent School District in this case have no merit under existing Georgia law. Accordingly, Petitioner's Complaint must be dismissed for failure to state a claim upon which

relief may be granted.

Official Immunity Bars Petitioner's State Law Tort Claims Against Individual Respondents

Similarly, Petitioner's causes of action are barred by the doctrine of official immunity. Just as Georgia school districts and boards are entitled to sovereign immunity, their employees -- here the individual Respondents -- are entitled to official immunity from personal liability for injuries sustained because of the negligent performance of discretionary official acts. *Crisp County School District v. Pheil*, 231 Ga. App. 139, 140, 498 S.E.2d 134 (1998).

As stated earlier, Petitioner alleged that the Respondents initiated and/or condoned a pattern of neglect and harassment against Petitioner and his daughter. Petitioner's state law tort claims include the following: "mental anguish", "neglect", "harassment", "cruelty", "reprisal", and "defamation". The Petitioner's complaint contains no allegation that any harassing or cruel actions, that any defamatory words or that any action was undertaken with any actual malice. In the alternative, there is no allegation that any of the duties were ministerial.

The Georgia Court of Appeals has described the applicability of official immunity as follows:

> Official immunity ... is applicable to government officials and employees sued in their individual capacities. While official immunity does not apply to purely ministerial duties required by

> law, public officials are immune from individual liability for discretionary acts undertaken in the course of their duties and without willfulness, malice, or corruption. This official immunity is intended to protect public officials in the honest exercise of their judgment, however erroneous or misguided that judgment may be. Otherwise, not only would it be difficult to get reasonable men to fill public office, but there would be constant temptation to yield officially to unlawful demands, lest private liability be asserted and enforced.

Schmidt v. Adams, 211 Ga. App. 156; 438 S.E.2d 659 (1993).

The question of whether official immunity applies to a particular claim turns on the determination of whether the underlying act is "ministerial", which is one required specifically by law, or "discretionary", which is one that requires the exercise of judgment or choice on the part of the official. The Court of Appeals has described this application of immunity as follows:

> It is a well established principle that a public official who fails to perform purely ministerial duties required by law is subject to an action for damages by one who is injured by his omission. However, it is equally well established that "where an officer is invested with

> discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as a result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority and "*without willfulness, malice or corruption.*" These discretionary acts ... lie midway between judicial and ministerial ones. The name of the public officer or officers is immaterial and the question depends on the character of the act. If the act done for which recovery is sought is judicial or quasi-judicial in its nature, the officer acting is exempt from liability.

Swofford v. Cooper, 184 Ga. App. 50, 52, 360 S.E.2d 624 (1987).[3]

In Georgia, when determining whether official immunity applies to a particular action, the Court of Appeals has indicated that "[t]he single overriding factor is whether the specific act from which liability

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[3] In making the same determination, the Court of Appeals in *Bitterman v. Atkins*, 217 Ga. App. 652, 654 (1995), also added "where public officials are acting within the scope of their duties and exercising a discretionary power, *the courts are not warranted in interfering*, unless fraud or corruption is shown or the power or discretion is being manifestly abused to the oppression of the citizen." *Id*, citing *Sisson v. Douglas County School District*, 181 Ga. App. 77, 3515 S.E. 2d 272, (1986) (emphasis added).

allegedly arises is discretionary or ministerial." *Id.*, citing *Shuman v. Dyess*, 175 Ga. App. 213, 216, 333 S.E.2d 379 (1985). This determination is made on a case-by-case basis. *Id.* Actions are to be analyzed for the purpose of the application of official immunity by analyzing the underlying act of the official. The Court of Appeals has described this process as follows:

> In Georgia the distinction between a ministerial and a discretionary act, and therefore the scope of the immunity granted a public official in any given situation turns upon the specific character of the complained-of act, not the more general nature of the job. Under this standard, it makes no difference that the official is required to perform discretionary acts if the complained-of act is more properly characterized as ministerial. The grant of [official] immunity, then, is really more in the nature of a transitory privilege rooted in the fear that a contrary rule would inhibit the judgment upon which good government rests.

Id. (citations omitted).

Courts have consistently defined ministerial and discretionary acts as follows:

> A ministerial act is commonly one that is simple, absolute, and definite, arising

> under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.

Kelly v. Lewis, 221 Ga. App. 506, 508, 471 S.E.2d 583 (1996), citing *Joyce v. Van Arsdale*, 196 Ga. App. 95, 96 (1990); see also *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E. 2d 54 (2007) (even statutorily-mandated actions are not ministerial duties if the mandated action is not "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty').

In *Gamble v. Ware*, 253 Ga. App. 819, 561 S.E.2d 837 (2002), the Court of Appeals affirmed the trial court's grant of motions to dismiss filed on behalf of various school administrators. The underlying facts of *Gamble v. Ware*, which are similar to the facts in the instant litigation, illustrate that Mr. Gamble, on behalf of his son K.G., filed an action against the superintendent of the Ware County School District, the assistant principal of the school where K.G. was a student, and the director of transportation for the school district regarding a school bus incident involving K.G. Apparently, K.G. was suspended from his school bus after he allegedly committed an act of sexual misconduct. Mr. Gamble filed suit against the above-referenced defendants alleging that they committed acts of negligence, intentional inflicted emotional distress, committed acts of libel, and other

unspecified malicious acts when they fabricated the sexual misconduct charges against K.G. and suspended him from the bus. *Id.* at 823-24.

The Georgia Court of Appeals affirmed the trial court's dismissal of these claims on the basis of official immunity. In doing so, the Court of Appeals reasoned that

> Gamble's complaints also present no justiciable tort issue regarding Superintendent Brantley, Assistant Principal Williams, and Transportation Director Beverly. The doctrine of official immunity 'protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice or corruption'.

Gamble, 239 Ga. App. at 824.

The state law tort claims dismissed in *Gamble v. Ware* are almost identical to the claims presented in the instant action. Just as in *Gamble*, these claims are also subject to immediate dismissal. Further, as in *Murphy v. Bajjani*, the Petitioner has not sufficiently alleged any actual malice to defeat the assertion of the defense of official immunity. *Bajjani*, 282 Ga. at 203. The appeals court's order should be affirmed.

Petitioner's Claim for Punitive Damages Fails

Further, Petitioner's claim for punitive

damages fails against the Respondents because of the application of sovereign immunity. In addition, the Petitioner alleged no facts to sustain a claim for punitive damages. Further, as a matter of public policy, punitive damages are not permitted against a public entity, such as a school district or school employees. *MARTA v. Boswell,* 261 Ga. 427, 427-428, 405 S.E. 2d 869 (1991). For the foregoing reasons, the dismissal of the Petitioner's claim for punitive damages should be affirmed.

Statute of Limitations Defense for State Law Claims

Petitioner cannot recover on his state law tort claims as they are barred by the two-year statute of limitation for such claims. The Petitioner has set forth no facts in which a tort was committed against him within two years of filing his suit, i.e., October 9, 2004. In general, personal injury claims must be brought within two (2) years after the right of action accrues, except for injuries to reputation, which must be brought within one (1) year. O.C.G.A. § 9-3-33. If such claims are not brought before the statute of limitations expires, they are subject to immediate dismissal. *Bynum v. Fulton-DeKalb Hosp. Auth.,* 267 Ga. App. 899, 600 S.E.2d 623 (2004).

Petitioner's tort claims are time barred as all of the alleged actions occurred well before October, 2004. For instance, the Petitioner claims that on October 15, 2003, some Respondents denied his daughter an evaluation in order to qualify for special education services. (Petitioner's Complaint, ¶ 6). Similar allegations are contained in Paragraph 5 of his complaint.

For the foregoing reasons, the Petitioner's state law tort claims are time barred. The appeals court's order should be affirmed.

Petitioner's Failure to Properly Serve the Respondents

Petitioner's Complaint must be dismissed because of the lack of personal jurisdiction over the Respondents as a result of the defective summons. Under Georgia law, the summons shall state the name and address of the Petitioner where the Respondent can respond. O.C.G.A. § 9-11-4(b). Here, the Petitioner did not provide his address but improperly provided address of the State Court of Cobb County. The Respondents raised the defense of "insufficient service of process and failure of service of process" in their Answers.

As this requirement is mandatory, rather than permissive, then the Petitioner has failed to satisfy this fundamental service requirement. "In the absence of service in conformity with O.C.G.A. § 9-11-4, the court does not obtain jurisdiction over the defendant." *Wilkinson v. Udinsky*, 242 Ga. App. 454 (1) (530 S.E.2d 215) (2000). Further, it is of no consequence that the Petitioner is proceeding pro se in this case. In a civil case, the court cannot put a pro se litigant on a different standard from one represented by counsel." *Merck v. St. Joseph's Hosp. of Atlanta,* 251 Ga. App. 631, 555 S.E.2d 11 (2001). Hence, dismissal of the Petitioner's complaint should be affirmed.

Petitioner Failed to Properly Plead His Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress Claim

Petitioner failed to state a claim for Intentional Infliction of Emotional Distress or Negligent Infliction of Emotional Distress. These claims in Petitioner's complaint failed to present a justiciable issue of law or fact. To explain, to the extent that the claim pled in Paragraph Eleven in Petitioner's Complaint states a cognizable state tort law cause of action, this claim for "mental anguish" would most likely be construed to be a claim for intentional infliction of emotional distress and/or negligent infliction of emotional distress under Georgia law. However, even if the Court construed this claim as such, it would still be subject to dismissal for failure to plead any facts in support of any claim for relief.

In order to properly plead an intentional infliction of emotional distress claim, an Petitioner in Georgia must show that a defendant's actions were terrifying or insulting as to humiliate, embarrass or frighten the Petitioner. *Georgia Power v. Johnson*, 155 Ga. App. 862, 863, 274 S.E.2d 17 (1980). The behavior attributed to the Respondents in this case cannot reasonably be characterized as humiliating, insulting, or terrifying, being confined, as it relates to matters concerning access to records, permission to join the PTSA, etc . . . . Further, there are no allegations that any egregious behavior was directed at the Petitioner. *MARTA v. Mosley*, 280 Ga. App. 486, 634 S.E.2d 466 (2006).

The pleading requirement for a negligent

infliction of emotional distress claim is even more stringent. Specifically, a party must show that there was some impact on the Petitioner, and that impact must be a physical injury. *Hall v. Carney*, 236 Ga. App. 172, 174, 511 S.E.2d 271 (1999).

Petitioner's state tort law claims against the Respondents as plead in his Complaint clearly fail to meet the above-referenced standards necessary to properly plead claims for intentional infliction of emotional distress and negligent infliction of emotional distress. As such, these claims are subject to dismissal. The appeals court's order should be affirmed.

Any Claim Premised on O.C.G.A. 20-2-720 Must Be Dismissed

O.C.G.A. § 20-2-720 contains no provision creating a private cause of action for a party claiming a violation of it. Any claim based on this statute in Petitioner's complaint failed to present a justiciable issue of law or fact. There is no case law interpreting this statute. Thus, the foregoing statute cannot provide a basis for civil liability against the Respondents and any claim based on that statute must be dismissed. The order of the trial court should be affirmed.

Petitioner's Claims in Count II, III, IV, V and VII are Barred for Failure to State a Cognizable Claim

All of Petitioner's claims are barred for failure to state a cognizable claim under Georgia law.

Specifically, Counts II, III, IV, V and VII failed to present a justiciable issue of law or fact. As difficult as it is to comprehend Petitioner's complaint, it is even more difficult to understand how any of these allegations amount to potential violation of Georgia tort law. The Petitioner has the following vague causes of actions: Count II – Neglect; Count III – Harassment; Count IV – Cruelty; Count V – Reprisal; and Count VII – Defamation of Character.

In Counts II through V, the Petitioner has not pled any cognizable claim under Georgia law. There is simply no cause of action in this jurisdiction for such claims. Further, even if there was a cause of action, he has set forth no facts in his complaint that would lead to any claim for relief. While a complaint is not required to set forth a cause of action, it is required to set forth a claim for relief. *Nicolson v. Windham*, 257 Ga. App. 429, 571 S.E. 2d 466 (2002). Specifically, there are no facts alleged in his complaint that would show that any Respondent neglected him, harassed him, was cruel to him or retaliated against him. As such, these claims must be dismissed.

Turning to the defamation claim, the Petitioner claims that Respondent Kelly Sullivan "exhibited herself" to intimidate the Petitioner on April 30, 2005. However, this claim is insufficient to set forth a tort claim because there was no touch or defamatory statement by this Respondent to constitute defamation or any other tort. In addition, the Petitioner has not alleged any defamatory statements. Further, the alleged conduct cannot be used to support a claim of defamation because it occurred more than a year from the filing of the suit. Finally, the School District cannot be liable for any such conduct because the allegation clearly occurred

after hours and off campus. Hence, Respondents' Motion to Dismiss should be affirmed.

Petitioner has Abandoned All of his Claims Against the Respondents

The Respondents filed their Motion to Dismiss all of Petitioner's claims against them on March 23, 2007 and on April 13, 2007. The Respondents moved to dismiss Petitioner's Complaint on one or more of the following bases: failure to state a claim; lack of personal jurisdiction; laches; lack of service; no claim for punitive damages; statute of limitations bar; failure to serve a proper summons on the Respondents; immunity bars Petitioner's claims; res judicata bars the Petitioner's federal law claims; and no claim is available under O.C.G.A. § 20-2-720. However, the Petitioner did not file a timely response brief. Even when the Petitioner did respond, he never directly responded to the issues raised in Respondents' motion.

Under the Uniform Superior Court Rules, a party must serve and file a response to a motion. Sup. Ct. R. 6.2. Because Petitioner failed to timely or to adequately address the legal defenses raised in Respondents' Motion to Dismiss, his state law tort claims against the Respondents are abandoned and subject to immediate dismissal. The appeals court's order dismissing the complaint should be affirmed.

Petitioner's Complaint Must be Dismissed for Failure to Serve the Complaint on Respondent Jones or Cohen

The Petitioner's complaint is barred because of the failure to serve the complaint and summons – ever – upon Respondent Jones or Respondent Cohen. As a result, the Court had no personal jurisdiction over Respondent Jones or Respondent Cohen and the statute of limitations bars all of Petitioner's claims against these Respondents.

The failure to serve a complaint subjects the complaint to dismissal. *Sawyer v. Sawyer*, 253 Ga. App. 619, 560 S.E. 2d 86 (2002). Here, the Respondent failed to ever serve Respondent Jones or Cohen with a complaint and summons. More than 180 days passed since the Petitioner filed suit before the Respondents moved to dismiss his complaint on this basis. As such, Petitioner's complaint against these Respondents must be dismissed.

The Petitioner had the burden of showing that, once he received notice of a problem with service of the complaint, he exercised not only reasonable diligence, but the "greatest possible diligence" in perfecting service. *Duffy v. Lyles*, 281 Ga. App. 377, 636 S.E. 2d 91 (2006). The Petitioner was provided with notice of the service problem with Respondent Cohen and Jones around November, 2006, when the service was returned unperfected. Since the burden is on the Petitioner to show reasonable diligence, he cannot simply state in conclusory fashion that reasonable and diligent efforts were made. *Duffy*, 281 Ga. App. at 379. As the Court of Appeals has stated,

> The plaintiff has the burden of showing diligence in attempting to effect service, which must be supported by specific dates and details. The plaintiff cannot

> simply state in conclusory fashion that reasonable and diligent efforts were made. The Court of Appeals of Georgia is required to strictly apply the service requirements because notice is the very bedrock of due process. In all, the burden is on the plaintiff to ascertain a defendant's residence, and that obligation does not arise only upon expiration of the statute of limitation. *Duffy*, 281 Ga. App. at 379.

Even if the Respondents had knowledge of the lawsuit, this does not excuse the Petitioner's failure to diligently attempt service of his complaint. "The applicable test ... is whether the plaintiff exercised due diligence, not whether the defendant had suffered harm." *Id.* The Petitioner has not provided any facts which would support the conclusion that he exercised the greatest possible diligence in perfecting service. As a result, the Petitioner is guilty of laches and dismissal of the complaint is required. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E. 2d 819 (2007).

The Georgia Court of Appeals affirmed the dismissal of plaintiff's complaint in the *Scott* case when the defendant was served thirty-one (31) days[4]

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[4] See also, *Elwell v. Cutler*, 185 Ga. App. 423, 364 S.E. 2d 81 (1987), where the trial court granted the motion to dismiss because of laches over untimely service of the complaint and summons. There was no issue that the Plaintiff's counsel knew of the Defendant's address. *McManus v. Sauerhoefer*, 197 Ga. App. 114, 397 S.E. 2d 715 (1990) (plaintiff guilty of laches for allowing sixty-three (63) days between the expiration of the limitation period and service.); *Williams v. Bragg*, 260 Ga. App. 377, 579 S.E. 2d 800 (2003). (Summary judgment affirmed on the basis of laches when Plaintiff not served until thirty-seven (37) days after filing of the complaint.).

after the statute of limitations expired because the law places the burden on the plaintiff to find the correct address of the defendant, and that burden arises prior to the expiration of the statute of limitations. *Scott v. Taylor*, 234 Ga. App. 543, 507 S.E. 2d 798 (1998).

As such, the appeals court's order dismissing the complaint should be affirmed.

Lack of Personal Jurisdiction over Respondent Jones or Cohen Because of Lack of Service

Because the Petitioner has failed to serve his complaint on Respondent Jones or Cohen personally, the Court has no personal jurisdiction over these Respondents. *Denny v. Croft*, 195 Ga. App. 871, 395 S.E. 2d 72 (1990). Hence, Petitioner's complaint must be dismissed and the trial court's order of dismissal affirmed.

Res Judicata Applies to All of Petitioner's Federal Law Claims

Because the U.S. District Court entered an order dismissing all of the Petitioner's federal law claims, then those claims are barred from being re-litigated in state court. O.C.G.A. § 9-12-40. The general rule is that the judgment of a competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue. *Helmuth v. Life Ins. Co. of Ga.*, 194 Ga. App. 685, 391 S.E. 2d 412 (1990). In the foregoing circumstances, those judgments are entitled to full

faith and credit. *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986). Res judicata bars the Petitioner's federal law claims in his complaint. *Bradley v. Ga. Inst. Of Tech.*, 228 Ga. App. 216, 217, 491 S.E. 2d 453 (1997). Hence, the Respondents moved that the U.S. Supreme Court give full faith and credit to the district court's order and not allow the Petitioner's federal law claims to be re-litigated. Petitioner's federal law claims should be dismissed.

II. CONCLUSION

Based on the foregoing, these Respondents request that the United State Supreme Court deny Petitioner's writ of certiorari.

Respectfully Submitted,

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Court of Appeals
of the State of Georgia

ATLANTA, February 26, 2008

The Court of Appeals hereby passes the following order:

A07A2356. CHISOLM v. TIPPENS ET AL.

We affirmed the dismissal of Marvin Chisolm's pro se action asserting various federal and state claims arising from defendants' alleged actions in denying Chisolm access to his daughter's educational records and rejecting his request for a full evaluation of her to rule out a learning disorder, concluding that Chisolm's complaint failed to state a claim for relief. In particular, we found that defendant school officials and employees were immune from liability. Chisolm has filed a motion for reconsideration, repeating the enumerations of error asserted in his original brief and reiterating that defendants are not immune from liability because the facts show show that they acted willfully, maliciously, and with a deliberate intent to injure. Chisolm also contends that the state court should have granted summary judgment in his favor.

Chisolm has not demonstrated that we overlooked a material fact I the record or misapplied controlling authority. Accordingly, his motion for reconsideration in the above-referenced appeal is hereby DENIED.

Court of Appeals of the State of Georgia,
Clerk's Office, Atlanta, February 26, 2008

I certify that the above is a true extract from the minutes of the court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin, III Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARVIN CHISOLM, Plaintiff,	)	
v.	)	CAFN: 1:06-CV-2767-BBM
KELLY J. SULLIVAN, ET AL., Defendants.	)	

ORDER

This action is before the court on the Motion to Dismiss [Doc. No. 3] filed by Kelly J. Sullivan, Beverly Shoun, Gary Boling, Kathryn Jones, Heather Moody, Tara Gauntt, Tom Dohrmann, Joe Redden, Lindsey Tippins, Curt Johnston, and Betty Gray ("School District Defendants"); the Motion to Dismiss [Doc. No. 4] filed by the Cobb County School District ("Cobb County"); the Motion for Summary judgment filed by plaintiff Marvin Chisolm ("Mr. Chisolm") [Doc. No. 6]; and the Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 1.8] filed by Cobb County and the School District Defendants ("defendants").

I. Factual and Procedural Background

On a motion to dismiss, the court accepts as true all factual allegations set out in the Plaintiff's complaint. See *Lotierzo v. Woman's*

World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). Therefore, except as otherwise noted, the following facts are taken from Mr. Chisolm's Complaint. As such, they do not constitute findings of fact by the court.

Mr. Chisolm is the father of Paris A. Chisolm ("Ms. Chisolm"), a student who attended Norton Park Elementary School and Floyd Middle School in the Cobb County School District, from October 3, 1997 through 2005. During this time, Mr. Chisolm was denied access to review school records, report cards, and progress reports pertaining to Ms. Chisolm. On October 15, 2003, Mr. Chisolm requested a full evaluation of Ms. Chisolm, to "rule out" a learning disorder. (Compl. ¶ 6.) Mr. Chisolm's request was denied. Thereafter, Mr. Chisoirn complained to the State Department of Education, the United States Department of Education Civil Rights Office, and elected officials. From 2004-2005, Mr. Chisolm withdrew his complaints while waiting to see if Floyd Middle School would place his daughter M special classes for reading and writing. Floyd Middle School did not do so, Mr. Chisolm also states that he was "harass[ed]" off of school grounds by a teacher, Ms. Kelly Sullivan. (Compl. ¶ 8.)

On October 9, 2006, Mr. Chisolm filed this action in the State Court of Cobb County against Cobb County and the School District Defendants alleging discrimination under Section 504 of the Rehabiliation Act, 29 U.S.C. § 794 (" Section 504"), violations of the Individuals with Disabilities Education Act, 20 U.S.C, § 1400 et

seq. ("IDEA"), violations of the No Child Left Behind Act , 20 U.S.C. § 6301 et seq. ("NCLB"), violations of parental rights under O.C.G.A. § 20-2-720, and various state claims including mental anguish, neglect, cruelty, reprisal, and defamation. Mr. Chisolm seeks $12,000,000 in general and special damages and punitive damages of $2,000,000.

II Discussion

A. Motions to Dismiss

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") provides for the dismissal of an action when a complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In general, a complaint should, be dismissed under Rule 12(b)(6) only when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v Gibson*, 355 U.S, 41, 45-46 (1957); see *Theoharous v. Fong*, 256 F,3d 1219, 1224 (11th Cir. 2001). .Accordingly, all facts that Mr. Chisolm has pleaded in his Complaint are accepted as true, and all "reasonable inferences therefrom are construed in the light most favorable to [hire]." *Bryant v. Avado Brands, Inc.*, 187 F.3d. 1271, 1274 n.1 (11th Cir. '1999). However, "conclusory allegations, unwarranted deductions of facts or *Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir, 2005) (internal quotations and citation omitted).

1. IDEAClaims

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that

emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U,S.C. 1400(d)(1)(A). The statute permits plaintiffs to seek "remedies available under the Constitution, [Section 504], or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(1). Under the IDEA, state and local education agencies must identify children with disabilities and develop an annual Individualized Education Program ("IEP") for each child. 20 U.S,C. § 1414.[1] Mr, Chisolm argues that his daughter was not properly classified and treated under this Act.

In order to bring a claim in. federal court under the IDEA, the aggrieved party must first exhaust the administrative remedies available to him or her under the Case I :06-cv-02767-BBM statute. *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378 (11th Cir, 1996); 20 U.S.C. § 1415(1). The Eleventh Circuit has held " any student who wants relief that is available under the IDEA must use the IDEA's administrative system, even if he [or she] invokes a different statute," *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006) (internal quotations and citations omitted). Indeed, the "philosophy of the IDEA is that plaintiffs are required to utilize the elaborate administrative scheme established by the IDEA before resorting to the courts to challenge the

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[1] The IEP is a comprehensive document developed by a team made up of parents, teachers, and other school administrators outlining the goals of the child, and the special education and related services needed to meet those goals. 20 U.S.C. § 1414(d).

actions of the local school authorities." *N.B.*, 84 F.3d at 1378 (internal quotations and citations omitted). However, a plaintiff is not required to exhaust his administrative remedies when resorting to those remedies would be futile or inadequate. Id. at 1379.

Under the IDEA, parents seeking a remedy must first request "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency," 20 U.S.C. § 1415(f)(1)(A). In Georgia, the Office of State Administrative Hearings conducts such hearings. O.C.G..A.. § 50-13-41(a)(1). If parents are dissatisfied with the administrative decision, they can then bring a civil action in either state or federal court. 20 U.S.C. § 1415(i)(2)(A). In this case, Mr. Chisolm has neither asserted that he has exhausted his administrative remedies, nor alleged facts indicating that pursuit of such remedies would be futile or inadequate. Mr. Chisolm mentions that he used a "grievance procedure[] (complaint) to upper echelon leadership, State Department of Education, and the US Department of Education civil rights office, and elected officials," (Compl. ¶ 6) but subsequently withdrew his complaints. Mr, Chisolm has set forth no facts indicating that he appeared before or received a ruling from the Georgia Office of State Administrative Hearings. Therefore, Mr. Chisolm has not exhausted the "administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities," *N.B.*, 84 F.3d at 1378 (internal quotations and citations

omitted). As set forth above, neither has Mr. Chisolm pleaded facts indicating that pursuit of his claim in the administrative system of the state of Georgia would be "futile" or "inadequate." *N.B.*, 84 F.3d at 1379.

Based upon this record, Mr. Chisolm has failed to state a claim upon which relief may be granted; therefore, defendants' Motions to Dismiss as they pertain to Mr. Chisolm's IDEA claims are GRANTED.

2. Section 504 of Rehabilitation Act of 1973 Claims

Section 504 of the Rehabilitation Act provides, to relevant part, that "[n]o otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." 29 U.S.C. § 794(a). Because Mr. Chisolm refers to Section 504 of the Rehabilitation Act in his Complaint and other pleadings, the court will analyze his general claim of "discrimination" pursuant to this statute.[2]

The Eleventh Circuit has repeatedly held claims asserted under Section 504 and/or the ADA

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[2] Defendants interpreted Mr. Chisolm's discrimination claim as a claim under 42 U.S.C. § 1983. However, Mr. Chisolm's complaint and subsequent motions make no reference to 42 U.S.C. § 1983. Rather, they reference the Section 504. Because "the plaintiff is the master of the complaint" this court will analyze Mr. Chisolm's discrimination claim pursuant to the Section 504, as pleaded. See, e.g., *Holmes Group, Inc., v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (200).

are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDE.A before bringing suit under Section 504 and/or the ADA.'" *M.T.V.*, 446 F.3d at 1158 (quoting *Babicz by v. School Bd.*, 135 F.3d 1420, 1422 n.10 (11th Cir, 1998)). Therefore, the court's analysis supra section II.A.1, is equally applicable here. As such, defendants' Motions to Dismiss as to this claim are GRANTED.

3. NCLB Claims

Mr. Chisolm alleges that defendants violated his right of "parental involvement" under the NCLB, (CompL 4.) Whether Mr. Chisolrn's NCLB claims are brought pursuant to 42 U.S.C. § 1983 or under an implied private right of action, the court must first "determine whether Congress intended to create a federal right," or "intended to confer individual rights upon a class of beneficiaries" in order to entertain the case. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 285 (2002). Indeed, the Eleventh Circuit has never recognized that the NCLB creates an individual right or private cause of action.

Neither does this court read the NCLB to indicate an, intention by Congress to create a private cause of action enforceable in a court of law or an individual right. See *Alliance for Children, Inc. v. City of Detroit Publ. Sch.*, ---- F, Supp, 2d ---, No. 06-15021, 2007 WL 576047, at *7 (E.D. Mich. Feb. 15, 2007); see also *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005); *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y 2003). Rather, the court is aware that

when Congress enacts legislation pursuant to its spending power, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1., 28 (1981).

Particularly when Congress codifies an enforcement scheme, such as that of the NCLB, "[i]t is implausible to presume that the same Congress nontheless intended private suits to he brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid." *Gonzaga,* 536 U.S. at 290 (discussing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, et al. ("FERPA")). Likewise, if Congress seeks to create new rights enforceable under 42 U.S.C. § 1983, "it must do so in clear and unambiguous terms -- no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.*

Because the NCLB does not create a private cause of action or create individual rights, Mr. Chisolm can prove no set of facts that would entitle him to relief in this court under this statute; therefore, defendants' Motions to Dismiss as to this claim are GRANTED.

4. State Law Claims

In his complaint, Mr. Chisolm also raises several claims under Georgia State law. Specifically, he alleges a violation of O.C.G.A. § 20-22-720 for

defendants' failure to render Ms. Chisolm's educational records to him.[3] Mr. Chisoim's other claims under Georgia law include: mental anguish, neglect, harassment, cruelty, reprisal, and defamation.

Although the district court has discretion to retain jurisdiction over a remaining state claim once federal claims have been dismissed, "federal courts have been encouraged to dismiss pendent state claims if all federal claims are resolved," *Rutledge v. Aluminum, Brick & Clay Workers Int'l Union,* 737 F,2d 965, 970 (nth Cir. 1984). Having been directed to no Georgia case law interpreting O.C.G.A. § 20-22-720, and finding none on its own, the court finds that this is a particularly inopportune case in which to exercise discretionary jurisdiction. Therefore, the court chooses not to exercise jurisdiction over Mr. Chisolm's remaining state claims and will DENY defendants' Motions to Dismiss on the state claims. Accordingly, all state law claims are to be REMANDED to state court.

B. Motion for Summary Judgment and Motion to Strike

Because this court has GRANTED IN PART the defendants' Motions to Dismiss and is

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[3] Instead of addressing Mr. Chisolm's claim under O.C.G.A. § 20-22-720, defendants interpreted Mr. Chisolm's failure to turn over educational records claim as one under FERPA. Again, the plaintiff is the master of his complaint, and it is upt o him to decide what law he intends to rely upon. *Holmes Group,* 535 U.S. at 830-31. Since Mr. Chisolm seeks relief under O.C.G.A. § 20-22-720, the court will not construe this claim under FERPA.

remanding Mr. Chisolm's remaining claims to state court, the Motion for Summary judgment filed by Mr. Chisolm [Doc, No. 6] and the Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] filed by defendants are each DENIED AS MOOT.

II. Summary

For the forgoing reasons, the Motion to Dismiss [Doc. No. 3] filed by the School District Defendants and the Motion to Dismiss [Doc. No. 4] filed by Cobb County are GRANTED as to all claims asserted pursuant to federal law, and DENIED as to Mr. Chisolm's state law claims, Mr. Chisolm's Motion for Summary Judgment [Doc. No. 6] and. the defendants' Motion to Strike Various Filings by Mr. Chisolm [Doc. No. 18] e each DENIED .AS MOOT. The remaining state law claims are REMANDED to the State Court of Cobb Counter, Georgia.

IT IS SO ORDERED, this 19th day of March, 2007.

s/ Beverly B. Martin

BEVERLY B. MARTIN

UNITED STATES DISTRICT JUDGE

SUPREME COURT OF GEORGIA

Case No. S08C1099 Atlanta, June 20, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARVIN CHISOLM v. LINDSEY TIPPENS, et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hines, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk